

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>Troy A. Leight</b>	:	
<b>-vs-</b>	:	
<b>Commonwealth Edison Company</b>	:	
	:	<b>15-0067</b>
	:	
	:	
	:	
	:	
	:	
<b>Complaint as to ComEd has failed to produce a recorded easement for the utility wires located on the southern border of 743 W. Bittersweet Place in Chicago, Illinois.</b>	:	

**RESPONDENT’S MOTION TO DISMISS AMENDED COMPLAINT**

Now comes the Respondent, Commonwealth Edison Company (“ComEd” or “Respondent”), by and through its attorney, Rebecca A. Graham, and moves the Administrative Law Judge (“ALJ”) of the Illinois Commerce Commission (“Commission”) to dismiss the amended formal complaint filed by Complainant Troy A. Leight on July 31, 2015 pursuant to Section 200.190 of the Commission Rules of Practice, 83 Ill. Admin. Code § 200.190.

**BACKGROUND**

Complainant filed his formal complaint on January 26, 2015 (“Complaint”). ComEd moved to dismiss the Complaint on March 24, 2015 on the grounds that it is barred in its entirety by ComEd’s Commission-approved tariffs (“Motion to Dismiss”). On April 22, 2015, the law firm of Burke, Warren, MacKay & Serritella, P.C. filed an appearance and Response brief on behalf of Complainant. The Motion to Dismiss was fully briefed.

The Motion to Dismiss was neither granted nor denied. Instead, the ALJ granted Complainant leave to file an amended complaint. At the status hearing held on June 2, 2014, the

ALJ stated on the record that the amended complaint must include applicable legal authority for the relief requested. Specifically, the ALJ stated:

You should be aware the Commission is not a venue of general jurisdiction.

Our forum is limited to that granted to us by the legislature. Therefore, the amended complaint should point to any applicable legal authority the Commission has pursuant to the Public Utilities Act and the Commission's rules and regulations to require that ComEd pay for any expenses related to changing or relocating transmission lines. (Trans. at 11).

Complainant, through his attorney, filed his three-count amended complaint on July 31, 2015. (“Amended Complaint”).

Not only is the Amended Complaint in its entirety barred by ComEd’s tariffs, but it fails to comply with the ALJ’s directive to “point to any applicable legal authority the Commission has pursuant to the Public Utilities Act and the Commission’s rules and regulations to require that ComEd pay for any expenses related to changing or relocating transmission lines.” (Trans. at 11) Complainant has not done so because there is no such authority. The Commission has no jurisdiction to give Complainant the relief he seeks, which is an injunction ordering ComEd to remove the 12kV line on the Property and monetary damages in the amount of \$200,000. (Amended Complaint at 4, 6).

### **LEGAL STANDARD**

Under Rule 200.190(a) of the Commission’s Rules of Practice a respondent may move to dismiss a proceeding. In deciding a motion to dismiss, the Commission must construe the facts in the light most favorable to the non-moving party. *See, e.g.,* Final Order, *Charles Gosser vs. Illinois Bell Telephone Company*, Docket 03-0431 (December 17, 2003).

## **ARGUMENT**

Complainant seeks an injunction and monetary damages in three counts for trespass (“Count I”), ejectment (“Count II”), and unjust enrichment (“Count III”). Since the Commission has no authority to grant any of the relief Complainant seeks, all three counts of the Amended Complaint fail as a matter of law and must be dismissed with prejudice. Even assuming, *arguendo*, that the Commission has the authority to fashion monetary damages or injunctive relief, the entire Amended Complaint is nonetheless barred by ComEd’s Commission-approved tariffs.

### **I. The Commission has no Authority to Award Monetary Damages or Injunctive Relief**

Counts I and II of the Amended Complaint seek injunctive relief for alleged trespass and ejectment, respectively, and Count III of the Complaint seeks monetary damages for alleged unjust enrichment. Since the “Commission derives its power solely from the statute and has none except it be by statute expressly conferred upon it,” the Commission only has the power to award the relief expressly conferred on it by the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (“PUA”). *Illinois Commerce Comm’n ex rel. East St. Louis, C&W Ry. v. East St. Louis & C. Ry. Co.*, 361 Ill. 606, 611 (1935).

Complainant has not and cannot point to any provision of the PUA that expressly confers upon the Commission the power to award monetary damages or injunctive relief. No such provision exists. *See, e.g., Moening v. Illinois Bell Tel. Co.*, 139 Ill. App. 3d 521, 528 (1985), citing *Barry v. Commonwealth Edison Co.*, 374 Ill. 473 (1940), and *Ferndale Heights Utility Co. v. Illinois Commerce Comm’n*, 112 Ill. App. 3d 175 (1982); *see also* Final Order entered on July 14, 2010 in *Ottenweller v. Central Illinois Light Co. dba Ameren CILCO*, Dkt. No. 10-0249 (“the Complainant’s request for relief for damages and injunctive relief is beyond the Commission’s statutory authority”). Since the Commission lacks the authority to grant Complainant monetary

damages or injunctive relief, all three counts fail as a matter of law and must be dismissed with prejudice.

**II. If Complainant wants Electric Service at the Property, he Must Allow ComEd to Maintain Facilities on the Property Pursuant to Tariff**

Even assuming, *arguendo*, that the Commission has the authority to award Complainant monetary damages or injunctive relief (and the law is well-settled that it does not have such power), the entire Complaint is nonetheless barred by tariff. Pursuant to ComEd's Commission-approved tariffs, ComEd has a right to have its facilities on the Property because Complainant is served by those facilities:

The retail customer or applicant must provide the Company with such permits, easements, or other rights as the Company reasonably deems necessary for the ownership, installation, operation, replacement, and maintenance of the Company's distribution facilities located or to be located at the premises for the provision of electric service.

(ComEd Exhibit A, ILL. C. C. No. 10, Original Sheet No. 149).

In other words, if Complainant wants electric service at his Property, then he is required to provide ComEd with the right to be on his property at a location where ComEd reasonably deems necessary for the maintenance of the facilities located on the premises. Implicit in the tariff is the customer's right to refuse ComEd access to a property if, and only if, the customer does not want electric service at that property. ComEd has received no indication from Complainant that he no longer wants electric service. Therefore, Complainant has no choice under the law but to provide ComEd with the right to install and maintain its facilities on his property where ComEd deems necessary.

In addition to granting ComEd the right to be on the Property, the Commission-approved tariffs also grant ComEd the right to continued access to the facilities without impediments from changes to the Property:

Following the installation, alteration, or acquisition of Company facilities at a premises, the retail customer or applicant must provide the Company ready and

continued access to such facilities without impediments from overbuilding, change in established grade or other obstructions to the operation, testing, inspection, maintenance and replacement of such facilities. It is the retail customer's or applicant's responsibility to obtain information from the Company regarding permitted clearances around distribution and related facilities.

(ComEd Exhibit B, ILL. C. C. No. 10, 1st Revised Sheet No. 153).

Put another way, once ComEd has installed facilities on a customer's property, that customer cannot alter the property in a way that interferes with ComEd's facilities and its access thereto.

Complainant's service relies on the facilities of which he is complaining. Those facilities were located on the Property when Complainant took possession of the property. If Complainant no longer wants service from ComEd, then ComEd will remove the facilities at issue.

If, however, Complainant wants to continue to receive service from ComEd, then he must either allow ComEd to maintain its facilities in their current location or he must provide ComEd with an alternative location: "[t]he retail customer or applicant must provide the Company with such permits, easements, or other rights as the Company reasonably deems necessary ... for the provision of electric service." (ComEd Exhibit A, ILL. C. C. No. 10, Original Sheet No. 149). Furthermore, Complainant is responsible for the cost of relocating those facilities.

On its face, the Amended Complaint fails as a matter of law. The Commission lacks any power to award monetary damages or injunctive relief, and even if it did have such power, all three counts of the Amended Complaint are nonetheless barred by ComEd's Commission-approved tariffs.

## **CONCLUSION**

Based on all of the foregoing, the Complaint in its entirety fails as a matter of law. Therefore, Respondent respectfully requests that the entire Complaint be dismissed with prejudice.

Respectfully submitted,  
Commonwealth Edison Company

By: /s/ Rebecca A. Graham

REBECCA A. GRAHAM  
Attorney for Respondent  
Graham & Graham LLP  
115 South LaSalle Street, Suite 2600  
Chicago, Illinois 60603  
Office: (312) 505-8154  
Fax: (312) 873-4089  
email:[rebecca@ragrahamlaw.com](mailto:rebecca@ragrahamlaw.com)

**CERTIFICATE OF SERVICE**

I, Rebecca A. Graham, an attorney, certify that a copy of the foregoing RESPONDENT'S MOTION TO DISMISS AMENDED COMPLAINT, along with supporting Exhibits A and B, was served on the following parties by U.S. Mail and/or electronic transmission on August 27, 2015.

Mr. Blake A. Roter  
Atty. for Troy A. Leight  
Burke Warren Mackay & Serritella, P.C.  
330 N. Wabash Ave., 21st Fl.  
Chicago, IL 60611  
[broter@burkelaw.com](mailto:broter@burkelaw.com)

Joseph E. von Meier  
Atty. for Troy A. Leight  
Burke Warren MacKay & Serritella, P.C.  
330 N. Wabash Ave., 21st Fl.  
Chicago, IL 60611  
[jvonmeier@burkelaw.com](mailto:jvonmeier@burkelaw.com)

Ms. Heather Jorgenson  
Administrative Law Judge  
Illinois Commerce Commission  
160 N. LaSalle St., Ste. C-800  
Chicago, IL 60601  
[hjorgens@icc.illinois.gov](mailto:hjorgens@icc.illinois.gov)

/s/ Rebecca A. Graham \_\_\_\_\_

REBECCA A. GRAHAM  
Attorney for Respondent  
Graham & Graham LLP  
115 South LaSalle Street, Suite 2600  
Chicago, Illinois 60603  
Office: (312) 505-8154  
Fax: (312) 873-4089  
email: [rebecca@ragrahamlaw.com](mailto:rebecca@ragrahamlaw.com)